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NO. 91-283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEVEN FRED DOUGLASS, SR.
Petitioner

VS.

THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI

KENT A. SCHAFFER
Counsel of Record
600 Travis, Suite 3000
Houston, TX 77002
(713)228-8500

QUESTION PRESENTED

1. Whether due process is offended when the trial court finds an accused guilty on a plea of no contest, where prior to sentencing, the accused states that he was not guilty of the offense charged.

2. Whether due process os offended by the trial court's failure to Sua Sponte withdraw the accused's plea of no contest, where the accused represented to the trial court that he was not guilty of the offense charged.

LIST OF PARTIES
IN APPELLATE COURT

Steven Fred Douglass, Sr.,

Appellant,

The State of Texas,

Appellee

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NO. _____

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REFERENCE TO OPINIONS TO LOWER COURT

The opinion of the Fourteenth Supreme Judicial District Court of Appeals of the State of Texas is produced in the appendix.

JURISDICTION

The ruling of the Fourteenth District Court of Appeals was rendered on December 13, 1990. See A-3. The Petitioner timely petitioned the Texas Court of Criminal Appeals for discretionary review. The Petition for Discretionary Review was refused on April 24, 1991. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1257, and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION AT ISSUE

The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On April 10, 1986, the Petitioner was indicted for the offense of aggravated sexual assault. (R.I-7). Petitioner entered a written plea of no contest and stipulation of evidence, and proceeded to trial before the court. (R.I-58). However, the Petitioner later asserted in a supplemental pre-sentence investigation report that he had not abused his son, thus he did not commit the sexual assault. (R.I-108).

On July 31, 1989, notwithstanding Petitioner's claim of innocence, the trial court accepted the plea of no contest, found Petitioner guilty and sentenced him to seven years. (R.I-267). Appeal was made to an intermediate appellate court which affirmed the conviction. Petitioner then petitioned the Texas Court of

Criminal Appeals for discretionary review, but was refused.

Following sentencing, Petitioner raised the federal question by way of motion for new trial, alleging that the plea was not voluntarily and knowingly entered.

In the Fourteenth District Court of Appeals of Texas, Petitioner raised the federal question by way of point of error, alleging that the plea of no contest was constitutionally defective since it was not knowingly and intelligently entered. The Court of Appeals overruled this contention by finding that the plea was not constitutionally defective since Petitioner had entered into written stipulations of evidence, waived appearance, confrontation and cross-examination of witnesses and allowed

introduction of testimony by affidavits, pursuant to Article 1.15 of the Texas Code of Criminal Procedure.

REASONS FOR REVIEW

In holding that Petitioner's plea of no contest was knowingly and intelligently entered, the Fourteenth District Court of Appeals of Texas rendered a decision in conflict with the standard established by this Honorable Court. See U.S. Supreme Court Rule 10(.1)(c).

The Court of Appeals holding is also in conflict with other United States Court of Appeals decisions on the issue of whether the trial court should have found Petitioner guilty on his plea of no contest where prior to sentencing he stated that he did not commit the offense. See U.S. Supreme Court Rule 10(.1)(b).

These reasons provide a compelling

basis for this Court to grant the instant Petition for Writ of Certiorari.

ARGUMENT

I.

THE DECISION IS CONTRARY TO UNITED STATES SUPREME COURT STANDARD REQUIRING SUFFICIENT FACTUAL BASIS TO SUPPORT A FINDING OF GUILT ON A PLEA OF NO CONTEST

It is constitutional error for a trial judge to accept a defendant's guilty plea "without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238 (1969). Under the Alford doctrine, a defendant who maintains his innocence may voluntarily plead guilty where he intelligently concludes that his interests require the entry of a guilty plea and the record contains strong evidence of actual guilt. (Emphasis added). North Carolina v. Alford, 400 U.S. 25 (1970).

This Court has held that an accused is entitled to the same constitutional safeguards on a plea of nolo contendere. In Alford at 37, the Court ruled that the fact that the plea was demoninated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance, because the Constitution is concerned with the practical consequences, not the formal categorizations of state law.

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty or no contest is entered. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment. Second is the right to trial by jury. Third is the right to confront one's accusers. See Boykin v. Alabama, supra, at 243. In the

instant case, the Petitioner waived these same constitutional rights when he entered his plea of no contest.

Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." Boykin, citing Jackson v. Denno, 378 U.S. 368 (1964). As to the right to counsel, there must be evidence to show that the accused intelligently and understandingly waived this right. This Court, in Boykin, ruled that this same standard must be applied to determine whether a guilty plea is voluntarily made. Petitioner's assertion of innocence in the pre-sentence report, negatived any finding of guilt. See Brady v. United States, 397 U.S. 742 (1970).

In North Carolina v. Alford, supra, as in the instant case, the accused denied that he committed the offense but persisted with his plea of guilty. However, the instant case is distinguishable from that of Alford. The Petitioner could not intelligently conclude, as did Alford, that his interest required the entry of a plea, when his position was, as stated in his pre-sentence report, that he did not commit the offense.

The question of an effective waiver of federal constitutional rights, which occurs upon entry of a plea of guilty or nolo contendere, is governed by federal standards. See Boykin v. Alabama, supra. Under federal standards (Fed. R. Crim. P. 11), the judge must satisfy himself that there is a factual basis for the plea.

McCarthy v. United States, 394 U.S. 459 (1969).

Petitioner asserted in a supplemental pre-sentence investigation, prior to sentencing, that he never abused the complainant, thus he was not guilty of the offense charged. At this point, it was apparent to the sentencing judge that the plea was not knowingly and intelligently entered. Therefore, the plea was obtained in violation of due process and is void. See McCarthy v. United States, supra.

II.

OTHER UNITED STATES COURT OF APPEALS HOLD THAT JUDGMENT UPON A PLEA WITHOUT A FACTUAL BASIS IS CONSTITUTIONAL ERROR

The Fifth Circuit Court of Appeals holds that when a defendant pleads guilty while claiming his or her innocence, the court commits constitutional error in accepting the plea unless the plea is

shown to have a factual basis. Willett v. State of Georgia, 608 F.2d 538, 540 (5th Cir. 1979).

In Willett v. State of Georgia, supra, the Court held that "in the face of a claim of innocence a judicial finding of some factual basis for defendant's guilt is an essential part of the constitutionally-required finding of a voluntary and intelligent decision to plead guilty." In that case, the Court noted that the record was void of any facts showing his guilt, therefore the plea was not voluntary and intelligent. In the instant case, the Petitioner's assertion that he did not commit the abuse was only countered by the complainant's allegation that he did.

The Eleventh Circuit Court of Appeals holds that the judge should assure himself

of a plea's factual basis in order to determine that it is a voluntary and intelligent decision. United States v. Gomez-Gomez, 822 F.2d 1008 (11th Cir. 1987). The Court reasoned that "it is far better for a court to err on the side of rejecting a valid plea than to violate a defendant's constitutional rights by entering judgment on a defective plea".

In United States v. Gomez-Gomez, supra, the Court rejected the defendant's plea after the pre-sentence report revealed that the defendant denied any knowledge of the marijuana found on the boat. On appeal, the Eleventh Circuit noted that the pre-sentence report eroded the Court's confidence in the factual basis of the plea. In the instant case, the Petitioner's statement that he never abused his son, should have similarly

eroded the Court's confidence. When the Petitioner cast doubt upon the validity of the plea by making exculpatory statements, the Court should have resolved such doubts against the plea, as was done in Gomez-Gomez.

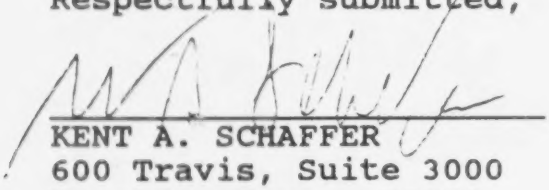
The trial court and the reviewing court hearing this case have rendered decisions which are in conflict with the decisions of those Circuit Courts cited above.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the decision of the Fourteenth Judicial

District Court of Appeals of Texas, and remand this cause for a new trial.

Respectfully submitted,



KENT A. SCHAFFER
600 Travis, Suite 3000
Houston, Texas 77002
(713)228-8500

CERTIFICATE OF SERVICE

I hereby certify that the an original and forty (40) copies of the foregoing Petition for Writ of Certiorari and its Appendix were mailed by the undersigned to the United States Supreme Court on the 22nd day of July, 1991. I also certify that true copies of the foregoing Petition of Writ of Certiorari were mailed to the following parties, via United States mail:

Linda A. West
Assistant District
Attorney, Harris
County, Texas
201 Fannin
Suite 200
Houston, Texas 77002
[One copy]

Solicitor General
Dept. of Justice
10th St. &
Constitution Ave.
Washington, D.C.
20530
[Three copies]

Steven Fred Douglass, Sr.
[One copy]

KENT A. SCHAFFER

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KENT A. SCHAFFER
Counsel of Record
600 Travis
Suite 3000
Houston, TX 77002
(713)228-8500

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IN THE
FOURTEENTH COURT OF APPEALS

NO. B14-89-00725-CR

STEVEN FRED DOUGLASS, SR.,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 444,323

OPINION

Appellant was indicted for the felony offense of aggravated sexual assault of a child. Tex. Penal Code Ann. § 22.021(a)(1)(B). Appellant entered a plea of no contest and following a presentence investigation report, was found guilty by

the court. Punishment was assessed at seven years imprisonment. We affirm.

Appellant's first point of error alleges that the trial court committed fundamental error in accepting his plea of no contest since the court made no determination that he was competent to stand trial. According to Tex. Code Crim. Proc. Ann. art. 26.13(c), no plea of guilty or nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is freely and voluntarily entered. The purpose of this article is to assure that the defendant does not plead guilty without a full understanding of the charges against him and the consequences of his plea. Basham v. State, S.W.2d 677, 678 (Tex. Crim. App. 1980). When no issue of a defendant's

sanity is raised in defense of the charges to which he pled guilty [1], and when the court has observed him and conversed with him, the court does not err in failing to question him about his sanity before accepting this plea. William v. State, 497 S.W.2d 306, 308 (Tex. Crim. App. 1973). Appellant specifically noted his approval in his written statement that he was mentally competent, and the court below had ample time to observe him before accepting the plea. The court's interaction with appellant constituted the "substantial compliance" necessary to satisfy article 26.13. Basham, supra; Adams v. State, 745 S.W.2d 536 (Tex. App.--Houston [1st Dist.] 1988, no pet.).

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[1] A plea of nolo contendere or no contest is equivalent to a plea of guilty. Fleet v. State, 607 S.W.2d 257, 258 (Tex. Crim. App. 1979).

Point of error number one is overruled.

Appellant's second point of error asserts that his plea of no contest was constitutionally defective since he had stated, in a supplement presentence investigation report that he was not guilty of the offense with which he was charged. Appellant contends that the trial court committed reversible error by accepting his plea without making further inquiry concerning a factual basis in the record to support the conviction. Appellant signed a judicial confession indicating that he did the acts as alleged in the indictment. Further, appellant entered into written stipulations of evidence, waived appearance, confrontation and cross-examination of witnesses and allowed introduction of testimony by affidavits pursuant to Tex. Code Crim.

Proc. Ann. art. 1.15. Appellant's confession alone is sufficient to sustain a conviction under the provisions of article 1.15. Potts v. State, 571 S.W.2d 180 (Tex. Crim. App. 1978); Willhoite v. State, 642 S.W.2d 531 (Tex. App.--Houston [14th Dist.] 1982, no pet.). Point of error number two is overruled.

In his final point of error, the appellant complains that the trial court committed fundamental error by failing to withdraw his plea, sua sponte, after evidence was presented which raised a doubt as to his guilt. This alleged evidence is one statement made by appellant in a supplemental part of the presentence investigation report that he "never abused Steven [his son]." The trial court is not required to sua sponte withdraw a plea of guilty when the

defendant enters the plea before the court after waiving a jury, even if evidence is adduced that might reasonably and fairly raise an issue of fact as to the guilt of the defendant. Goodie v. State, 735 S.W.2d 871, 873 (Tex. App.--Houston [14th Dist.] 1987, pet. ref'd, 745 S.W.2d 379 (Tex. Crim. App. 1988); Thomas v. State, 599 S.W.2d 823 (Tex. Crim. App. 1980). Appellant's single statement does not raise any reasonable issue as to his innocence, and the trial court did not err in failing to withdraw the plea. Point of error number three is overruled.

The judgment of the trial court is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed December 13, 1990.

Panel consists of Justices Robertson, Sears, and Draughn.

Do Not Publish - Tex. R. App. P. 90

OFFICE NOTICE April 24, 1991

COURT OF CRIMINAL APPEALS

COA #14-89-00725-CR

RE: Case No. 0133-91

STYLE: Douglass, Steven Fred

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711